

1 Hon. Benjamin H. Settle  
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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 HILDA L. SOLIS, SECRETARY OF LABOR, )  
9 UNITED STATES DEPARTMENT OF LABOR, ) Case No. 3:08-cv-05479-BHS  
10 Plaintiff, )  
11 STATE OF WASHINGTON, DEPARTMENT OF ) **SECRETARY OF LABOR'S MOTION**  
12 SOCIAL AND HEALTH SERVICES, ) **TO CERTIFY ORDERS GRANTING**  
13 Defendant. ) **IN PART DEFENDANT'S MOTION**  
14 ) **TO COMPEL AND DENYING**  
15 ) **RECONSIDERATION THEREOF AS**  
16 ) **IMMEDIATELY APPEALABLE**  
17 ) **PURSUANT TO 28 U.S.C. § 1292(b)**  
18 )  
19 ) **Noted for Consideration: March 12, 2010**  
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16 COMES NOW Plaintiff in this matter and hereby moves this Court to enter an Order Certifying  
17 that its February 10, 2010 Order Granting in Part Defendant's Motion to Compel and its February 16,  
18 2010 Order denying Plaintiff's Motion for Reconsideration of that Order are immediately appealable to  
19 the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b).  
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22 **I. FACTS**

23 On December 14, 2009, Plaintiff filed a Motion for a Protective Order to Protect the Identities of  
24 Witness Employees Pursuant to the Government's Informant Privilege. Dkt. 38. On January 12, 2010,  
25 Defendant filed a Motion to Compel (Dkt. 51) and on January 25, 2010 Plaintiff filed her Response to  
26 that Motion (Dkt. 54). On February 10, 2010, this Court entered an Order Granting Plaintiff's Motion for  
27 a Protective Order to Protect the Identities of Witness Employees Pursuant to the Government Informant  
28 Privilege and Granting in Part and Denying in Part Defendant's Motion to Compel. Dkt. 60. The Court's

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1 Order requires Plaintiff to timely comply with its discovery obligations. On February 12, 2010, Plaintiff  
 2 filed a Motion for Reconsideration of the court's February 10, 2010, Order Granting in Part Defendant's  
 3 Motion to Compel (Dkt62). On February 16, 2010 this Court entered an Order Denying Plaintiff  
 4 Secretary of Labor's Motion for Reconsideration of Order Granting in Part Defendant's Motion to  
 5 Compel (Dkt. 64). This Order was served on the parties on February 18, 2010.

6 **11 ARGUMENT**

7 28 U.S.C. § 1292(b) states:

8 When a district judge, in making in a civil action an order not otherwise appealable  
 9 under this section, shall be of the opinion that such order involves a controlling  
 10 question of law as to which there is substantial ground for difference of opinion and  
 11 that an immediate appeal from the order may materially advance the ultimate  
 12 termination of the litigation, he shall so state in writing in such order.

13 The Ninth Circuit has set forth a three prong test for 1292(b) orders that needs to be met in order for an  
 14 order pursuant to this statutory provision to be entered: 1) that there be a controlling question of law, (2)  
 15 that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may  
 16 materially advance the ultimate termination of the litigation. In re Cement Antitrust Litigation, 673 F.2d  
 1020, 1026 (9<sup>th</sup> Cir.1982).

17 Recently the Supreme Court addressed the issue of the applicability of 28 U.S.C. § 1292(b) in the  
 18 context of an appeal of an adverse discovery ruling concerning the attorney-client privilege. Mohawk  
 19 Industries, Inc. v. Carpenter, 130 S.Ct. 599, 607 (2009). In ruling that a District Court order requiring  
 20 disclosure of material in discovery normally protected by the attorney-client privilege did not qualify for  
 21 immediate appeal under the collateral order doctrine, the Court addressed concerns that there was no  
 22 avenue, other than the collateral order doctrine, to address discovery orders implicating the attorney-  
 23 client privilege:

24 Moreover, were attorneys and clients to reflect upon their appellate options, they  
 25 would find that litigants confronted with a particularly injurious or novel privilege  
 26 ruling have several potential avenues of review apart from collateral order appeal.  
 27 First, a party may ask the district court to certify, and the court of appeals to accept, an  
 28 interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The preconditions for § 1292(b)  
 review--"a controlling question of law," the prompt resolution of which "may

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1 materially advance the ultimate termination of the litigation"--are most likely to be  
 2 satisfied when a privilege ruling involves a new legal question or is of special  
 3 consequence, and district courts should not hesitate to certify an interlocutory appeal  
 in such cases.

4 Id.

5 The situation presented by this Court's Orders regarding Defendant's Motion to Compel falls  
 6 squarely within the situation discussed by the Supreme Court in Mohawk. This Court's ruling will  
 7 require Plaintiff to disclose the identity of individuals who have provided information to the Secretary of  
 8 Labor during her investigation into Defendant's compliance with the Fair Labor Standards Act of 1938,  
 9 29 U.S.C. § 201 *et seq.* While this Court has disagreed with Plaintiff regarding the use of this privilege  
 10 in responding to discovery requests and held that the privilege does not protect employees who  
 11 voluntarily provided information to Plaintiff during her investigation, other courts have consistently  
 12 applied the privilege in similar situations and protected from disclosure just such persons. Brock v. On  
 13 Shore Quality Control, 811 F.2d 282, 283 (5th Cir. 1987); Dole v. Local 1942, Int'l Bro. of Teamsters,  
 14 870 F.2d 368, 372 (7th Cir. 1989); Brennan v. Engineered Products, Inc., 506 F.2d 299, 302 (8th Cir.  
 15 1974); Reich v. Great Lakes Collection Bureau, Inc., 172 F.R.D. 58, 60 (W.D.N.Y. 1997).

16 Courts have also recognized that the privilege serves important government interests in that  
 17 enforcement of the FLSA is highly dependent on the cooperation of, and statements given by, employees  
 18 and such cooperation may not be forthcoming unless the government can assure confidentiality.  
 19 Brennan v. Engineered Products, Inc., 506 F.2d at 302. This is because employees are dependent on an  
 20 employer's good will and thus vulnerable to perceived or actual retaliation. Wirtz v. B.A.C. Steel  
 21 Products, Inc., 312 F.2d 14, 16 (5th Cir. 1962). This Court's rulings requiring Plaintiff to disclose such  
 22 information is contrary to this long established precedent in other Circuit courts and therefore constitutes  
 23 a ruling of special consequence implicating the Secretary's ability to not only protect persons who  
 24 voluntarily provided information in this case but also to be able to conduct effective future  
 25 investigations. One court in dicta has acknowledged that requiring disclosure of information protected  
 26 by the government informant's privilege can constitute a controlling question of law for purposes of 28  
 27 U.S.C. § 1292(b) particularly where the issue presented is novel or the law is not well settled. White v.  
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1 Nix, 43 F.3d 374, 378 n.3 (8<sup>th</sup> Cir.1994). The Ninth Circuit has also accepted for review under 28  
 2 U.S.C. § 1292(b) the issue of whether documents demanded in discovery were protected from disclosure  
 3 by the attorney-client privilege. Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 339 (9<sup>th</sup> Cir.1996);  
 4 Transamerica Computer Co., Inc. v. IBM Corp., 573 F.2d 646, 647-48 (9<sup>th</sup> Cir.1978). But see U.S. v.  
 5 Woodbury, 263 F.2d 784, 787-88 (9<sup>th</sup> Cir.1959).

6 The issue presented by this Court's rulings is also a new legal question in this Circuit.<sup>1</sup> While  
 7 the Ninth Circuit in Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1072-73 (9<sup>th</sup>  
 8 Cir.2000) noted in dicta that in FLSA actions brought by the Secretary of Labor the government  
 9 informant's privilege "may be used to conceal names of employees who precipitated the suit by filing  
 10 complaints with the Department of Labor," this was not the ruling of the Court and was offered in the  
 11 context of emphasizing the important public interests presented by the private party plaintiffs  
 12 requesting that their identities be kept confidential. Indeed, the cases from other circuits cited  
 13 approvingly by the Ninth Circuit in making this statement in Advanced Textile apply the privilege to  
 14 persons who voluntarily provide information other than initial complainants. See Brennan v.  
 15 Engineered Products, Inc., 506 F.2d at 303-04 (applying privilege to overturn District Court ruling  
 16 requiring Secretary to list witnesses nearly three months before trial); Usery v. Ritter, 547 F.2d 528,  
 17 531 (10<sup>th</sup> Cir.1977) (holding government informant's privilege protected Secretary from answering  
 18 interrogatory to identify all employees or individuals who provided information to the Department of  
 19 Labor); U.S. v. Hemphill, 369 F.2d 539, 541-42 (4<sup>th</sup> Cir.1966)(holding government informant's  
 20 privilege protected Secretary from disclosing statements of persons who provided information who  
 21 were not to be called as witnesses); Mitchell v. Roma, 265 F.2d 633, 637 (3<sup>rd</sup> Cir.1959)(government  
 22 informant's privilege protects Secretary from identifying persons who had provided the Department  
 23 with written statements). Indeed, the court in Advanced Textile goes on to elaborate that the public's  
 24 greatest interest lies in allowing robust enforcement of the FLSA, using confidential informants. "[A]s

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 26 <sup>1</sup> In Wirtz v. Rosenthal, 388 F.2d 290 (9<sup>th</sup> Cir.1967) the Ninth Circuit, with very little analysis of the issue, did address the  
 27 government informant's privilege in a very brief per curium decision limiting its conclusion that the privilege did not  
 apply to the unspecified facts of the case.

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the Supreme Court has recognized, fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights. See Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."). Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d at 1073.

### III CONCLUSION

As the Supreme Court noted in Mohawk, “litigants confronted with a particularly injurious or novel privilege ruling” may proceed pursuant to 28 U.S.C. § 1292(b). Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. at 607. As demonstrated above, certifying these Orders as immediately appealable pursuant to 28 U.S.C. § 1292(b) would “serve as [a] useful ‘safety valve’ for promptly correcting serious errors”. Id. at 608. Therefore, Plaintiff respectfully urges this Court to follow the Supreme Court’s directive that in circumstances such as this “district courts should not hesitate to

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1 certify an interlocutory appeal in such cases.” Id. at 607.

2 Respectfully submitted this 25th day of February, 2010.

3  
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5 Acting Deputy Solicitor

6 Lawrence Brewster  
7 Regional Solicitor

8 Bruce L. Brown  
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16 By: /s/ Jay Williamson  
17 **U.S. DEPARTMENT OF LABOR**  
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## **CERTIFICATE OF SERVICE**

I do hereby certify that on February 25, 2010 I electronically filed the foregoing Secretary of Labor's Motion to Certify Orders Granting in Part Defendant's Motion To Compel and Denying Reconsideration Thereof as Immediately Appealable Pursuant To 28 U.S.C. § 1292(b) and Proposed Order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

1. Kara A. Larsen, Counsel for Defendant State of Washington, Department of Social and Health Services;
2. Patrick Madden, Counsel for Defendant State of Washington, Department of Social and Health Services; and
3. Steven R. Peltin, Counsel for Defendant State of Washington, Department of Social and Health Services.

By /s/ Jay Williamson  
Jay Williamson, Counsel for Plaintiff

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